

San Francisco Bay Conservation and Development Commission

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60th Day After Mailing: February 17, 2017

Hearing Date: February 16, 2017

**VIOLATION REPORT/COMPLAINT
FOR THE IMPOSITION OF ADMINISTRATIVE CIVIL PENALTIES
ENFORCEMENT INVESTIGATION NO. ER2013.009
SCOTT'S JACK LONDON SEAFOOD INC., AND PORT OF OAKLAND**

**FAILURE TO RESPOND TO THIS VIOLATION REPORT/COMPLAINT FOR
THE IMPOSITION OF ADMINISTRATIVE CIVIL PENALTIES BY COMPLETING THE
ENCLOSED STATEMENT OF DEFENSE FORM AND ENCLOSING ALL PERTINENT
DECLARATIONS UNDER PENALTY OF PERJURY, PHOTOGRAPHS, LETTERS, AND OTHER
WRITTEN DOCUMENTS COULD RESULT IN A CEASE AND DESIST ORDER, A PERMIT
REVOCATION ORDER, OR A CIVIL PENALTY ORDER BEING ISSUED TO YOU OR A SUBSTANTIAL
ADMINISTRATIVE CIVIL PENALTY BEING IMPOSED ON YOU WITHOUT YOUR HAVING AN
OPPORTUNITY TO CONTEST THEM OR TO INTRODUCE ANY EVIDENCE.**

The San Francisco Bay Conservation and Development Commission is issuing this Violation Report/Complaint for the Imposition of Administrative Civil Penalties and Statement of Defense Form (Violation Report/Complaint) because the Commission's staff (staff) believes that you may be responsible for or involved with a possible violation of either the Commission's laws or a Commission-issued permit. The report contains a brief summary of all the pertinent information that staff currently has concerning the possible violation and references all the pertinent evidence on which the staff currently relies. All the evidence to which this report refers is available in the enforcement file for this matter located at the Commission's office. You can review these materials at the Commission's office or have copies made at your expense, or both, by contacting Adrienne Klein or Marc Zeppetello of the Commission's staff at (415) 352-3600. This report also informs you of the nature of the possible violations so that you can fill out the enclosed statement of defense form and otherwise be prepared for Commission enforcement proceedings.

Issuing this report and the enclosed Statement of Defense form is the first step in formal Commission enforcement proceedings. Subsequently, either the Commission and/or its Enforcement Committee may hold an enforcement hearing and the Commission will determine what, if any, enforcement action to take.

Careful reading and a timely response to these materials is essential to allow you to present your side of the case to the Commission. A copy of the Commission's enforcement regulations is also included so that you can fully understand the Commission's enforcement procedures. If you have any questions concerning either the Violation Report, the enclosed Statement of Defense form, the procedures that the Commission and its Enforcement Committee follow, or anything else pertinent to this matter, please contact, as quickly as possible, Adrienne Klein or Marc Zeppetello of the Commission's staff at (415) 352-3600. Thank you for your cooperation.

I.¹ Person or Persons Believed Responsible for Illegal Activity

Even though this Violation Report/Complaint often refers to only one of the two co-Permittees, both co-Permittees are jointly responsible for each and every violation described herein.

Name of Lessee: Scott's Jack London Seafood Inc.

Liz Gallagher, President

Address: 255 3rd Street, Suite 102
Oakland, California 94607

Name of

Property Owner: Port of Oakland

Richard Sinkoff, Director of Environmental Programs And Planning

Address: 530 Water Street
Jack London Square
P.O. Box 2064
Oakland, California 94604-2064

II. Brief Description of the Nature of the Illegal Activity

- A. **Construction of Unpermitted Development.** The unauthorized construction of a metal-framed entry doorway, storage area and stage, wood and metal-framed wall, multiple moveable wall panels and ceiling tracks in the pavilion; roof extension.
- B. **Non-Permit Compliant Use of the Pavilion** in violation of Special Condition II.B.2.c, Event Schedule Reporting, including Permit Exhibit A, Guidelines for Private Use of Public Pavilion, during a 12-year period by:
 1. Providing fewer than 292 public use days per year;
 2. Providing, on average per month during winter season, fewer than five (5) public use weekend days and nights;

¹ For purposes of this Violation Report, the Arabic numbers of Appendix H of the Commission's Regulations (the source of the format and content of this Violation Report) are converted to Roman numerals.

3. Holding, on average per month during winter season, more than four (4) private use weekend days and nights;
 4. Holding, on average per month during summer season, more than three (3) private use weekend days and nights;
 5. Providing fewer than three (3) public use weekend days and nights per month; and
 6. Holding more than two consecutive private use days.
- C. **Unpermitted Use of the Franklin and Broadway Street Plazas** by placing tents and stanchions, storing event related equipment (including planters), and displaying promotional vehicles.
- D. **Untimely Submittal of Private Event Schedules** as required by Special Condition II.B.2.c, Event Schedule Reporting, including Permit Exhibit A, Guidelines for Private Use of Public Pavilion.
- E. **Failure to Dedicate the Pavilion Public Access Area Prior to Commencement of Construction**, as required by Special Condition II-B-3, Permanent Guarantee.
- F. **Failure to Provide All Required Public Access Improvements During Public Use Days**, as required by Special Condition II.B.5, Improvements Within the Public Access Area.
- G. **Failure to Obtain Plan Approval Prior to Installation of Public Access Improvements**, as required by Special Condition II.A, Specific Plans and Plan Review.

III. Description and Location of Property on Which Illegal Activity Occurred

The violations are located in the Commission's shoreline band. The violations described in Section II.A and II.B above occurred, and are occurring, in and adjacent to the public pavilion portion of Scott's Jack London Seafood Restaurant located in Jack London Square, in the City of Oakland, Alameda County. The violations described in Section II.C above occurred, and are occurring, in the Broadway and Franklin Street Plazas.

IV. Name of Owner, Lessee, and Other Person(s) Who Control Property on Which Illegal Activity Occurred

Scott's Jack London Square Seafood, Inc. (Scott's) and the Port of Oakland (Port).

V. Approximate Date Illegal Activities Occurred

Beginning on or about 2000, and continuing through the present.

VI. Summary of All Pertinent Information Currently Known to the Staff in the Form of Proposed Findings with References to all Pertinent Supporting Evidence Contained in the Staff's Permit and Enforcement Files.

See Section VII below.

VII. Provisions of Law or Commission Permit that the Staff Alleges have been Violated

- A. **Combined Sections.** The following findings respond jointly to Sections VI and VII.
- B. **Relevant Files.** This Violation Report/Complaint is based on the following findings and the relevant San Francisco Bay Conservation and Development Commission (BCDC) documents referred to herein and listed in the attached Index of the Administrative Record. The following files are available at the Commission's office for your review; you should call the above listed staff enforcement officer to arrange to review the files.
1. Permit File No. 1985.019.22A issued to the Port of Oakland;
 2. Permit File No. 1985.019.09B issued to Scott's Jack London Seafood Inc. and the Port of Oakland; and
 3. Enforcement File Nos. ER2013.009 and ER2004.010.
- C. **Factual Background**
1. On March 6, 1986, the Commission issued to the Port BCDC Permit No. 1985.019.00 for development activities along a six-block section of the Port's waterfront property between Jefferson and Harrison Streets known as Jack London Square.
 2. On February 13, 1996, the Commission issued BCDC Permit No. 1985.019.08, which added Scott's, a tenant of the Port, to the Port's permit, and authorized the construction, use and maintenance of a 4,400-square-foot pavilion, in a portion of the Franklin Street Plaza, for shared public and private use, at a ratio of 80% public to 20% private², and the installation of café seating, benches, lighting and other site furnishings within the pavilion and the larger approximately 23,000-square-foot Franklin Street Plaza.
 3. On July 8, 1997, the Commission split BCDC Permit No. 1985.019.08 into two permits:
 - a. BCDC Permit 1985.019.08A (hereafter "the Port's Permit") issued solely to the Port pertains to all of Jack London Square except the pavilion; and
 - b. BCDC Permit No. 1985.019.08B (hereinafter "the Permit") issued to Scott's and the Port pertains to only the pavilion.
 4. On October 7, 1997, the Commission re-issued the Permit, as BCDC Permit No. 1985.19.09B, to correct the omission of a special condition that occurred during the permit split. The Permit has not been amended since that date.
 5. In December 2012, BCDC staff learned that Scott's had commenced construction of certain modifications to the pavilion without obtaining approval from BCDC staff or the Commission, which upon completion in March 2013, included an unauthorized permanent metal-frame doorway and new retractable wall panel system, and that Scott's had also installed planters in a public access area without authorization.

² The permit does not distinguish for and nonprofit events; they both constitute private use of a public space.

6. On May 16, 2013, BCDC's Chief of Enforcement issued, pursuant to section 11386 of the Commission's regulations (14 C.C.R. § 11386), an enforcement letter to the Permittees describing a number of alleged violations of the McAteer-Petris Act ("MPA") and/or the Permit including:
 - a. Construction of an unauthorized metal-framed doorway, storage area, and stage, and installation of multiple planters, in a public access area;
 - b. Failure to obtain BCDC staff approval of design and construction plans prior to replacing the former tent walls with a retractable wall panel system used to enclose the pavilion;
 - c. Failure to provide six years of reports of private events in the pavilion;
 - d. Failure to permanently guarantee all the public access improvements at the pavilion; and
 - e. Failing to install and maintain all the public access improvements at the pavilion for at least 292 days per year.
7. The May 16, 2013, enforcement letter directed the Permittees to take certain actions to retain the opportunity to resolve the alleged violations with standardized fines, as specified in 14 C.C.R. § 11386, including:
 - a. Remove the metal-framed doorway, storage area, and planters from the public access area;
 - b. Submit and obtain BCDC staff approval of a full set of plans for the retractable wall panel system;
 - c. Submit six years of past due reports of private events for the pavilion meeting the requirements of the Permit;
 - d. Submit and obtain BCDC staff approval of a legal instrument to dedicate the public access area; and
 - e. Install and repair certain public access improvements.
8. Following receipt of the May 16, 2013, enforcement letter, the Permittees did not remove the unauthorized structures and improvements. Instead, Scott's continued to use the pavilion for private events and engaged in discussions with BCDC staff over an approximately two-year period regarding the possibility of obtaining after-the-fact approval of some or all of the unauthorized structures or improvements either by BCDC staff, through plan review and approval, or by potential amendments to the Permit and the Port's Permit. The Permittees made two presentations regarding their various proposals to BCDC's Design Review Board, on February 10, 2014 and April 16, 2015. As of the date of this Violation Report/Complaint, Permittees have not submitted a complete application to amend the Permit or the Port's Permit, and have not removed or obtained approval of the unauthorized

construction of the metal-framed entry doorway, storage area and stage, retractable wall panel system or roof connection, or of the unauthorized installation of the multiple planters in the public access area.

9. After learning of Scott's unauthorized construction activities in a dedicated public access area, BCDC staff continued its enforcement investigation. That investigation revealed numerous additional alleged violations of the Permit or the Port's Permit, including but not limited to, Scott's extensive non-Permit complaint use of the pavilion for private events over an approximately 12-year period.
10. In or about September 2015, BCDC staff informed the Permittees that the Executive Director intended to initiate an enforcement proceeding regarding the numerous violations of the Permit or the Port's Permit, including, but not limited to the unresolved issues regarding Scott's unauthorized construction in a public access area, that would likely result in the Commission issuing a cease and desist and civil penalty order against the Permittees. The Permittees requested an opportunity to seek to negotiate a proposed settlement with BCDC.
11. On July 19, 2016, the Parties agreed to a settlement in principle on the terms of a proposed stipulated order, subject to review and approval of the proposed order by the Commission's Enforcement Committee and by the Commission.
12. On October 20, 2016, the Enforcement Committee held a public hearing and adopted the staff recommendation that the Commission issue the proposed stipulated order.
13. On November 3, 2016, the Commission rejected the Enforcement Committee's recommended enforcement decision (i.e., adoption of the proposed stipulated order). The Commission provided comments on certain issues raised by the alleged violations and directed the staff to commence a formal enforcement proceeding if staff and Respondents were unsuccessful in returning to the Enforcement Committee within two months with a different proposed order that responded to and took into account the direction provided by the Commission.
14. Following the November 3rd Commission meeting, Respondents arranged a meeting with staff for November 29, 2016. Staff informed Respondents that they must submit a modified settlement proposal responsive to the Commission's direction to staff by November 22, 2016, failing which staff would cancel the meeting and commence a formal enforcement proceeding. Having not received a modified settlement proposal by November 28, 2016, staff cancelled the meeting. By letter dated December 8, 2016, to Marc Zeppetello from Michael P. Verna, Scott's counsel, Scott's provided a settlement proposal to staff. After reviewing Scott's proposal, and after further discussions between BCDC's Chief Counsel and Mr. Verna regarding the prospects for reaching an agreement on a proposed settlement, staff determined that the proposal was not responsive to the Commission's direction and that it would not be possible to reach an agreement with Respondents on a revised

proposed stipulated order that would be acceptable to the Commission. Therefore, on December 19, 2016, staff commenced a formal enforcement proceeding by mailing this Violation Report/Complaint to Respondents.

- D. **Alleged Violations.** There are seven categories of alleged violations described in Sections E through K, below. The following information is provided for each category: (a) nature of the violations; (b) legal basis for the violation; and (c) description and evidence of violations.

E. **Construction of Unpermitted Development**

1. **Nature of Violations.** Construction of unpermitted development consisting of:
 - a. Roof extension west of the pavilion;
 - b. Storage area and stage west of the pavilion; and
 - c. Metal-framed entry doorway, wood and metal-framed wall, multiple moveable wall panels and ceiling tracks in the pavilion.
2. **Legal Basis for Violation.** Under California Government Code Section 66632(a), any person or governmental agency wishing to place fill, to extract materials, or to make any substantial change in use of any water, land or structure, within the area of the commission's jurisdiction shall secure a permit from the commission.
3. **Description and Evidence of Violations.** Scott's conducted the following activities within the area of the Commission's jurisdiction without obtaining a permit or permit amendment:
 - a. **Roof Extension West of the Pavilion.** As evidenced by Port staff member Julie Braun's observations outlined in an email dated April 24, 2015, and as shown in Google Earth aerial imagery, on or about March, 2000, Scott's constructed a roof extension joining its building to the pavilion;
 - b. **Storage Area and Stage West of the Pavilion.** As evidenced by the observations of Ms. Braun, as described in an email, dated April 24, 2015, to Adrienne Klein, Chief of Enforcement, and as shown in photographs taken by Ellen Miramontes, Bay Design Analyst, during a site visit on March 12, 2013, on or about July, 2011, Scott's constructed a 255-square foot storage area; and
 - c. **Metal-framed Entry Doorway, Wood and Metal-Framed Wall, Multiple Moveable Wall Panels and Ceiling Tracks in the Pavilion.** As evidenced by the observations of Tammy Borichevsky and Keith Miller, California Canoe and Kayak, in emails, dated February 25, March 3, and March 6, 2013, the first two of which included photographs, between December 28, 2012, and March 6, 2013, Scott's constructed a permanent wall in the northwest corner of the pavilion, a permanent metal-framed entry doorway on the east side of the pavilion and a retractable wall panel system to enclose the pavilion.

F. Non-permit Compliant Use of the Pavilion

1. **Nature of Violations.** Non-permit compliant use of the pavilion through excessive private use:
 - a. **Minimum Number of Public Use Days (annual).** Providing fewer than 292 public use days per year;
 - b. **Minimum Number of Public Use Weekend Days and Nights³ (winter season average).** Providing, on average per month during winter season (January – April, November and December), fewer than five (5) public use weekend days and nights;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Holding, on average per month during winter season, more than four (4) private use weekend days and nights;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Holding, on average per month during summer season (May – October), more than three (3) private use weekend days and nights;
 - e. **Minimum Number of Public Use Weekend Days and Nights Per Month.** Providing fewer than three (3) public use weekend days and nights per month; and
 - f. **Maximum Number of Consecutive Private Use Days.** Holding more than two consecutive private use days.
2. **Legal Basis for Violations.** Special Condition II.B of the Permit and Permit Exhibit A, entitled “Guidelines for Private Use of Public Pavilion,” together set forth the following requirements:
 - a. The pavilion must be publicly available for 292 days/year and may be privately occupied for a maximum of 73 days/year;
 - b. The pavilion must be available for public use an average of five (5) weekend days and nights per month during the winter season;
 - c. The average number of weekend days and nights for private use may not exceed four (4) weekend days and nights per month during the winter season;
 - d. The average number of weekend days and nights for private use may not exceed three (3) weekend days and nights per month during the summer season;
 - e. There must be at least three (3) weekend days and nights available for public use every month; and
 - f. There must not be more than two consecutive private use days.

³ Permit Exhibit A defines “weekend nights” as Friday and Saturday and “weekend days” as Saturday and Sunday, which this report collectively refers to as “weekend days and nights”.

3. **Description and Evidence of Violations.** Staff relied on data from the Port's property manager, who dispatched a security officer to monitor pavilion use on a daily basis, for the non-permit compliant uses of the pavilion that occurred in 2004 through 2007 and 2012 through 2015. Between 2008 and 2011, Port-generated data was not provided. In the absence of data from the Port's property manager, staff relied on data from Scott's for the non-permit compliant uses of the pavilion that occurred in 2008 through 2011.⁴
4. **2004.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated March 31, 2005, as adjusted by Commission staff:⁵
 - a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 268 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of five (5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of seven (7) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** In May, there were only two (2) [vs. the minimum three (3)] required public use weekend days and nights; and
 - f. **Maximum Number of Consecutive Private Use Days.** In May, there were six (6) more than two consecutive private use days. In June, there were four (4) more than two consecutive private use days. In August, there were two (2) more than two consecutive private use days.

⁴ Commission staff believes that the data from Scott's for 2008, 2009, 2010, and 2011 under-reports private pavilion use because whenever two sets of data are available, the Port property manager's data shows more private pavilion use than Scott's data.

⁵ In calculating the minimum number of public use days, the Port's property manager counted two private events that occurred on the same day as two days of non-public use. BCDC staff has counted each of these 11 dual-event days as a single private use day, resulting in 11 more public access days than calculated by the Port's property manager.

In calculating the three monthly averages, the Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

The Port's property manager did not calculate the minimum number of public use weekend days and nights per month nor the maximum number of consecutive private use days.

5. **2005.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated March 31, 2006, as adjusted by staff:⁶
 - a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 255 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of six and a half (6.5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of seven and six tenths (7.6) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In April there were six (6) more than two consecutive private use days. In May there were eight (8) more than two consecutive private use days. In June, there were two (2) more than two consecutive private use days. In October, there was one (1) more than two consecutive private use days. In November there were two (2) more than two consecutive private use days. In December there were nineteen (19) more than two consecutive private use days.
6. **2006.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated February 22, 2007, as adjusted by Commission staff:⁷

⁶ In calculating the three monthly averages, Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

The Port's property manager did not calculate the minimum number of public use weekend days and nights per month nor the maximum number of consecutive private use days.

⁷ In calculating the minimum number of public use days, the Port's property manager determined that there were 286 public use days whereas staff, reviewing the same data, determined that there were 266 public use days.

In calculating the three monthly averages, the Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

The Port's property manager did not calculate the minimum number of public use weekend days and nights per month nor the maximum number of consecutive private use days.

- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 266 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of five and a half (5.5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of six and a half (6.5) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In March there were eight (8) more than two consecutive private use days. In May, there was one (1) more than two consecutive private use days. In October, there were two (2) more than two consecutive private use days. In November, there were two (2) more than two consecutive private use days. In December, there were three (3) more than two consecutive private use days.
7. **2007.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated April 7, 2008, as adjusted by Commission staff:⁸
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 278 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of four and a half (4.5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;

⁸ In calculating the minimum number of public use days, the Port's property manager determined that there were 258 public use days whereas staff, reviewing the same data, determined that there were 278 public use days.

In calculating the three monthly averages, the Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

The Port's property manager did not calculate the maximum number of consecutive private use days.

- d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of four and a half (4.5) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In February there was one (1) more than two consecutive private use days. In May, there were two (2) more than two consecutive private use days. In December, there were six (6) more than two consecutive private use days.
8. **2008.** As evidenced by the information contained in the report prepared by Steve Hanson, Scott's consultant, dated July 19, 2013, as modified by Commission staff's calculations:⁹
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 273 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of four and eight tenths (4.8) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of five and eight tenths (5.8) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In March there was one (1) more than two consecutive private use days. In April, there were two (2) more than two consecutive private use days. In May there was one (1) more than two consecutive private use days. In August, there were three (3)

⁹ Scott's data consist of a list of 107 events, the date on which the event occurred, and the hours of duration of each event. The report totals the number of hours that the 107 events lasted and, based on this, concludes that the pavilion was occupied for a 19-day period, or at 5.35% of capacity. Scott's reached this conclusion by calculating the total number of hours the pavilion was used for private events and divided that number by 24 hours. Scott's methodology for calculating private pavilion use is flawed because any day the pavilion is subject to any private use for any amount of time counts as a private use day. Staff conducted independent calculations and reached significantly different conclusions.

more than two consecutive private use days. In October, there were two (2) more than two consecutive private use days. In December, there were two (2) more than two consecutive private use days.

9. **2009.** As evidenced by the information contained in the undated report from Scott's submitted by John Briscoe with a letter, dated June 20, 2013, as adjusted by Commission staff:¹⁰
 - a. **Minimum Number of Public Use Days (annual).** No violation;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** No Violation;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of three and eight tenths (3.8) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In October there were two (2) more than two consecutive private use days. In December, there was one (1) more than two consecutive private use days.
10. **2010.** As evidenced by the information contained in the undated report from Scott's submitted by John Briscoe with a letter, dated June 20, 2013, as adjusted by Commission staff:¹¹
 - a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 277 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** No Violation;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of four (4) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;

¹⁰ Scott's data consist of a list of un-numbered events, and the date on which the event occurred. Staff conducted independent calculations to reach the conclusions cited herein.

¹¹ Scott's data consist of a list of un-numbered events and the date on which the event occurred. Staff conducted independent calculations to reach the conclusions cited herein.

- e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In April, there were for two (2) more than two consecutive private use days. In May there was one (1) more than two consecutive private use days. In June there was one (1) more than two consecutive private use days. In October, there were for four (4) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there was one (1) more than two consecutive private use days.
11. **2011.** As evidenced by the information contained in the undated report from Scott's submitted by John Briscoe with a letter, dated June 20, 2013, as adjusted by Commission staff:¹²
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 280 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** No Violation;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of five and one tenth (5.1) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In March there was one (1) more than two consecutive private use days. In May, there were two (2) more than two consecutive private use days. In July there was one (1) more than two consecutive private use days. In September, there were two (2) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there were two (2) more than two consecutive private use days.
12. **2012.** As evidenced by the information contained in the report from Michael Meyer, Director, Cushman & Wakefield of California, Inc., dated April 18, 2013, as adjusted by Commission staff:¹³

¹² Scott's data consist of a list of un-numbered events and the date on which the event occurred. Staff conducted independent calculations to reach the conclusions cited herein.

¹³ The Port's property manager determined that there were 182 private use days. The Port's property manager did not calculate the minimum number of public use days. The Port's property manager states that Scott's exceeded

- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 171 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of nine (9) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of eight and half (8.5) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** In March, there was only one (1) [vs. the minimum three (3)] required public use weekend days and nights. In May, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights. In September, there were only two (2) [vs. the minimum three (3)] required public use weekend days and nights. In December, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights; and
 - f. **Maximum Number of Consecutive Private Use Days.** In January, there was one (1) more than two consecutive private use days. In February, there were two (2) more than two consecutive private use days. In March, there were 15 more than two consecutive private use days. In April, there were 10 more than two consecutive private use days. In May, there were 19 more than two consecutive private use days. In June, there were two (2) more than two consecutive private use days. In July, there were six (6) more than two consecutive private use days. In August, there were four (4) more than two consecutive private use days. In September, there were 15 more than two consecutive private use days. In October, there were four (4) more than two consecutive private use days. In November, there were six (6) more than two consecutive private use days. In December, when construction of the new pavilion enclosure commenced, there were twenty-nine (29) more than two consecutive private use days.
13. **2013.** As evidenced by the information contained in the report from Jennifer Koidal, General Manager, Cushman & Wakefield of California, Inc., dated March 12, 2014, as adjusted by Commission staff:¹⁴

the number of consecutive private use days but did not provide this or any other calculations. Staff conducted independent calculations to reach the conclusions cited herein.

¹⁴ The Port's property manager determined that there were 153 private use days. The Port's property manager did not calculate the minimum number of public use days. The Port's property manager states the number of weekend days and nights that the pavilion was in private use but it does not calculate the required averages. It states that

- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 207 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** On average, Scott's provided only four and six tenths (4.6) [vs. the minimum of five (5)] publicly available weekend days and nights in the months of January, February, March, April, November and December;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of eight and six tenths (8.6) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of six and one tenths (6.1) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** In January, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights. In February, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights; and
 - f. **Maximum Number of Consecutive Private Use Days.** In January, there were twenty-nine (29) more than two consecutive private use days. In February, there were twenty-eight (28) more than two consecutive private use days. In March, when construction of the new pavilion enclosure was completed, there were eleven (11) more than two consecutive private use days. In April, there were five (5) more than two consecutive private use days. In October, there were three (3) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there were sixteen (16) more than two consecutive private use days.
14. **2014.** As evidenced by the information contained in the report from Michael Meyer, Director, Cushman & Wakefield of California, Inc., dated March 16, 2015, as adjusted by Commission staff:¹⁵
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 271 of the required 292 days;

Scott's exceeded the number of consecutive private use days but did not provide this or any other calculations. Staff conducted independent calculations to reach the conclusions cited herein.

¹⁵ The Port's property manager determined that there were 97 private use days. The Port's property manager did not calculate the minimum number of public use days. The Port's property manager states the number of weekend days and nights that the pavilion was in private use but it does not calculate the required averages. It states that Scott's exceeded the number of consecutive private use days but did not provide this or any other calculations. Staff conducted independent calculations to reach the conclusions cited herein.

- b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of five (5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of four and five tenths (4.5) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In April, there were five (5) more than two consecutive private use days. In May, there were three (3) more than two consecutive private use days. In June, there was one (1) more than two consecutive private use days. In October, there were three (3) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there were five (5) more than two consecutive private use days.
15. **2015.** As evidenced by the information contained in the report from Jennifer Koidal, Vice President and General Manager, CIM Group, dated July 18, 2016, as adjusted by Commission staff:¹⁶
- a. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of three and six tenths (3.6) [vs. the maximum of three (3)] weekend days and nights in the months of May through October; and
 - b. **Maximum Number of Consecutive Private Use Days.** In February, there was one (1) more than two consecutive private use days. In May, there were three (3) more than two consecutive private use days. In October, there were four (4) more than two consecutive private use days. In December, there was one (1) more than two consecutive private use days.

¹⁶ The Port's property manager did not calculate the required average number of weekend days and nights that the pavilion was in private use, but it does not calculate the required averages. It states that Scott's exceeded the number of consecutive private use days, closed the retractable wall panels too soon before some events and opened them too long after the end of some events, and lapsed in maintenance of floor and furniture. Staff conducted independent calculations to reach the conclusions cited herein.

G. Unpermitted Use of the Franklin and Broadway Street Plazas¹⁷

1. **Nature of Violations.** The installation, storage or display of unauthorized structures as follows:
 - a. Unauthorized use of the Broadway Street Plaza by displaying a promotional vehicle adjacent to the main restaurant entrance; and
 - b. Unauthorized use of the Franklin Street Plaza (outside the pavilion boundary) by installing event tents, stanchions, and planters and by storing event-related equipment including planters.
2. **Legal Basis for Violations.** Under California Government Code Section 66632(a), any person or governmental agency wishing to place fill, to extract materials, or to make any substantial change in use of any water, land or structure, within the area of the commission's jurisdiction shall secure a permit from the commission.
3. **Description and Evidence of Violations.** Scott's conducted the following activities within the area of the Commission's jurisdiction without obtaining a permit or permit amendment:
 - a. As evidenced by an email from Steve Fagalde, Senior Vice President, Scott's, to Julie Braun, dated December 16, 2011, for a 30-day period each summer of the years 2000 through 2011, Scott's parked a promotional vehicle in the Broadway Street Plaza. This totals 330 days;
 - b. As evidenced by the photographs contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated March 31, 2005:
 - (1) On May 8, 2003, Scott's installed a tent in the Franklin Street Plaza.
 - (2) On May 9, 2003, Scott's installed a tent and stanchions in the Franklin Street Plaza.
 - (3) On May 10, 2003, Scott's installed a tent, stanchions and planters in the Franklin Street Plaza.
 - (4) On May 23, 2003, Scott's installed a tent and stanchions in the Franklin Street Plaza.
 - (5) On May 25, 2003, Scott's installed a tent in the Franklin Street Plaza.
 - (6) On September 20, 2003, Scott's installed a tent, stanchions and planters in the Franklin Street Plaza.
 - c. For a five-day period between 9:00 am on December 7, and 9:00 am on December 12, 2012, Scott's installed a tent in the Franklin Street Plaza, as evidenced by: (a) Security Officer Tim Crosby's notes contained in the report

¹⁷ Both the Franklin and Broadway Street Plazas are dedicated public access areas subject to the requirements of the Port's Permit.

submitted by Jennifer Koidal, General Manager, Cushman and Wakefield, dated March 12, 2014; and (b) A photograph attached to an email, dated December 19, 2012, from Maryann Starn, General Manager, Cushman and Wakefield to BCDC staff;

- d. As evidenced by a photograph attached to an email of the same date to Mr. Fagalde from Ms. Starn, Cushman and Wakefield, on December 19, 2012, Scott's installed an entry doorway and carpeted walkway with railings in the Franklin Street Plaza adjacent to the pavilion;
- e. As evidenced by photographs taken by Lee Huo, San Francisco Bay Trail, attached to an email of the same date, on February 10, 2014, Scott's stored event related equipment and placed planters in the Franklin Street Plaza;
- f. As evidenced by photographs taken by Keith Miller, California Canoe and Kayak, sometime before February 25, 2013, Scott's installed a tent in the Franklin Street Plaza, apparently for construction staging;
- g. As evidenced by photographs taken by Mr. Miller, California Canoe and Kayak, on April 28, 2013, Scott's installed planters in the Franklin Street Plaza;
- h. On April 30 and May 1, 2013, Scott's installed tents in the Franklin Street Plaza, as evidenced by: (a) Universal Protection Services' Security Officer Alan Humphrey's notes in the report submitted by Ms. Koidal, Cushman and Wakefield, dated March 12, 2014; and (b) Photographs taken by Mr. Miller, California Canoe and Kayak;
- i. As evidenced by four photographs taken by Security Officer Humphrey, submitted to Julie Braun, Port, by email, dated May 22, 2013, for a 26-hour period beginning on May 19, 2013, and ending on May 20, 2013, Scott's erected a tent in the Franklin Street Plaza;
- j. As evidenced by Universal Protection Services' Security Officer Dominic Wade's notes in the report submitted by Ms. Koidal, Cushman and Wakefield, dated March 12, 2014, for a 24-hour period beginning at 7:00 am on June 8, 2013, and ending on June 9, 2013, Scott's erected a tent in the Franklin Street Plaza;
- k. As evidenced by observations of the staff of the Port of Oakland and summarized in a letter dated July 18, 2013, from Adrienne Klein, BCDC's Chief of Enforcement, to John Briscoe, Briscoe, Ivester and Bazel LLP, Scott's former counsel, for at least a 36-day period from June 12th to July 18, 2013, Scott's staged a promotional vehicle in the Broadway Plaza;
- l. As evidenced by a photograph attached to a letter dated December 19, 2013, to Mr. Fagalde from Ms. Koidal, General Manager, Cushman and Wakefield, on December 18, 2013, Scott's erected a tent in the Franklin Street Plaza;
- m. As evidenced by photographs taken by Ms. Klein during a site visit, on January 21, 2014, unauthorized planters and other equipment, including the public tables and chairs, were stored in the Franklin Street Plaza;

- n. On April 28, 2014, Scott's erected a tent in the Franklin Street Plaza (south of the pavilion) and also placed pipes and ladders in the Franklin Street Plaza, creating non-public conditions, as evidenced by: (a) the photograph attached to the letter, dated April 30, 2014, to Mr. Fagalde from Jennifer Koidal, Cushman and Wakefield; (b) observations by Sean Palmer, General Manager, Kincaid's Restaurant; and (c) observations by Tammy Borichevsky, California Canoe and Kayak, in an email dated April 28, 2014;
- o. As evidenced by the letter to Mr. Fagalde, dated July 2, 2014, from Monique Scott, Assistant Property Manager, Cushman and Wakefield, on July 2, 2014, Scott's staged a promotional vehicle in the Broadway Street Plaza;
- p. As evidenced by Ms. Klein's observations during a site visit on September 19, 2014, and documented with photographs, the following conditions existed at the public pavilion:
 - (1) Despite being publicly available, two of the retractable wall panels were in place along the southern, waterside of the pavilion;
 - (2) Seven unauthorized planters were in place, two next to the stage/storage area and five in the Port's public access area near the southern exit door from the restaurant;
 - (3) Several unauthorized benches were located inside the pavilion in line with the structural support columns; and
 - (4) An hydraulic jack was stored in the northwest corner of the pavilion.
- q. For approximately 40 hours beginning at 8:20 am on December 7, 2014, and ending at midnight on December 8, 2014, Scott's erected a tent in the Franklin Street Plaza and placed planters and stanchions, as evidenced by: (a) Universal Protection Services' Security Officer Rashema Jacobs' notes in the report, dated March 16, 2015, from Ms. Koidal, Cushman and Wakefield; and (b) three photographs submitted by Mr. Miller, California Canoe and Kayak, via email on December 8, 2014;
- r. As evidenced by Security Officer Rashema Jacobs' notes in the report, dated March 16, 2015, from Ms. Koidal, Cushman and Wakefield, for approximately 15 hours beginning at 8:25 am on December 16, 2014, Scott's erected a tent in the Franklin Street Plaza;
- s. As evidenced by Keith Miller's and Jennifer Koidal's observations on September 21, 2015, Scott's erected a red carpet, stanchions and dining tables in the Franklin Street Plaza;
- t. As evidenced by photographs taken by Ade Barari on August 14, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, Scott's placed eleven planters (10 terra cotta and one metal) in the Franklin Street Plaza;

- u. As evidenced by photographs taken by Tammy Borichevsky and submitted by Keith Miller on August 15, 2016, Scott's stored four stacks of private dining tables, two serving tables, one mechanical lift, and placed seven planters (five terracotta and one metal) in the Franklin Street Plaza;
- v. As evidenced by photographs taken by Mark Madamba on August 16, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, Scott's placed eight terra cotta planters and one mechanical lift in the Franklin Street Plaza; and
- w. As evidenced by photographs taken by Mark Madamba on August 17, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, Scott's placed four terra cotta planters and one mechanical lift in the Franklin Street Plaza.

H. **Untimely Submittal of Private Event Schedules**

1. **Nature of Violations**

- a. Failure by Scott's to submit to the Port by the 1st of January, April, July and October of each year, a quarterly calendar of events;
- b. Failure by the Port to submit to BCDC by March 1st of every year, a summary of the scheduled events for the previous year; and
- c. Holding unscheduled events.

2. **Legal Basis For Violations.** Special Condition II.B of the permit including Permit Exhibit A, entitled "Guidelines for Private Use of Public Pavilion," sets forth the following requirements:

- a. **Quarterly Calendar of Events.** By the 1st of January, April, July and October of each year, Scott's must submit a quarterly calendar of events to the Port;
- b. **Annual Summary of Events.** By March 1st of every year, the Port must submit a summary of the scheduled events for the previous year to BCDC; and
- c. **Unscheduled Events.** The holding of an event within the pavilion or public access plaza not listed in the schedule of events, or the approval of a schedule of events that is inconsistent with the Permit Exhibit A, Guidelines for Private Use of the Pavilion, is prohibited.

3. **Description and Evidence of Violations.** The cumulative total number of days late that the Permittees have submitted the quarterly calendars of events and the annual summaries of events is 1,145 days.

- a. **Quarterly Calendar of Events.**¹⁸ The cumulative total number of days late that the Permittees have submitted the nine quarterly calendars of events is 766 days as outlined below:

¹⁸ Following the issuance of an enforcement letter, dated May 16, 2013, the Permittees submitted the annual reports for Years 2008 through 2012 on June 20, 2013, ranging from five years to three months past due. As described in staff's response to this submittal, dated July 18, 2013, staff accepted the annual reports as retroactive fulfillment of the requirement to provide the quarterly reports and the Permittees accrued no standardized fines

- (1) On April 5, 2013, Scott's submitted a 2013 first quarter calendar of events, as evidenced by an email from Jennifer Koidal, dated July 13, 2015. On April 5, 2013 (and again on October 1, 2013, revised), Scott's submitted a "committed" calendar of events from April 3rd through December 2013, as evidenced by an email from Jennifer Koidal, dated July 13, 2015, which renders these four reports a cumulative total of 97 days late, as of July 1, 2016;
 - (2) On January 13, 2014, Scott's submitted its first quarter calendar of events. On March 5, 2014, Scott's submitted its second quarter calendar of events. On October 1, 2014, Scott's submitted a third and fourth quarterly "activity report", as evidenced by an email from Jennifer Koidal, dated July 13, 2015, which renders these four reports a cumulative total of 104 days late;
 - (3) On January 16, 2015, Scott's submitted its first quarter calendar of events. On June 9, 2015, Scott's submitted its second quarter calendar of events. On July 1, 2015, Scott's submitted its third quarter calendar of events. Scott's did not submit a 2015 fourth quarter calendar of events, as evidenced by an email from Jennifer Koidal, dated July 13, 2015, which renders these three reports a cumulative total of 357 days late, as of July 1, 2016; and
 - (4) Scott's did not submit a 2016 first quarter calendar of events. On April 27, 2016 (and again on May 18, 2016, revised), Scott's submitted its second quarter calendar of events. On April 27, 2016, Scott's submitted its third and fourth quarter calendars of events, as evidenced by an email from Jennifer Koidal, dated July 18, 2016, which renders these four reports a cumulative total of 208 days late, as of July 1, 2016.
- b. **Annual Summary of Events.** The cumulative total number of days late that the Permittees have submitted the annual summaries of events is 379 days as outlined below:
- (1) In 2003, the Permittees submitted the annual summary of events 54 days late, as evidenced by the letter, dated April 23, 2004, from Rhonda Hirata, Cushman and Wakefield, to Adrienne Klein;
 - (2) In 2004, the Permittees submitted the annual summary of events 30 days late, as evidenced by the letter, dated March 31, 2005, from Rhonda Hirata, Jack London Square Marketing, to Adrienne Klein;
 - (3) In 2005, the Permittees submitted the annual summary of events 30 days late, as evidenced by the letter, dated March 31, 2006, from Rhonda Hirata, Jack London Square Marketing, to Adrienne Klein;

- (4) In 2006, the Permittees submitted the annual summary of events 53 days late, as evidenced by the letter, dated February 22, 2007, from Rhonda Hirata, Jack London Square Marketing, to Adrienne Klein;
- (5) In 2007, the Permittees submitted the annual summary of events 37 days late, as evidenced by the letter, dated April 7, 2008, from Brian Lee, Cushman and Wakefield, to Adrienne Klein;¹⁹
- (6) In 2013, the Permittees submitted the annual summary of events 11 days late, as evidenced by the letter, dated March 12, 2014, from Jennifer Koidal, Cushman and Wakefield to Adrienne Klein;
- (7) In 2014, the Permittees submitted the annual summary of events 15 days late, as evidenced by the letter, dated March 16, 2015, from Jennifer Koidal, Cushman and Wakefield to Adrienne Klein; and
- (8) In 2015, the Permittees submitted the annual summary of events 149 days late, as evidenced by the letter, dated July 18, 2016, from Jennifer Koidal, CIM Group to Adrienne Klein.

I. Failure to Dedicate the Pavilion Public Access Area

- 1. **Nature of Violation.** Failure to dedicate the required public access area before commencement of construction of the pavilion.
- 2. **Legal Basis for Violation.** Special Condition II.B.3, Permanent Guarantee, requires the Permittees to dedicate the 4,400-square-foot public access area known as the pavilion prior to the commencement of construction.
- 3. **Description and Evidence of Violations**
 - a. Sometime between February 13, 1996, the date of issuance of the permit amendment that authorized the pavilion and 2000, exact date unknown, the Permittees commenced and completed construction of the pavilion;
 - b. By letter dated May 16, 2013, Ms. Klein notified the Permittees that they had failed to dedicate the 4,400-square-foot public access area;
 - c. Following notification of this Permit violation, between May 16 and September 11, 2013, the Permittees prepared several draft legal instruments for staff's review;
 - d. On September 11, 2013, BCDC Legal Intern Simran Mahal conditionally approved a draft legal instrument, as evidenced by an email of the same date to Peter Prows, Briscoe, Ivester & Bazel, LLP, counsel to Scott's;

¹⁹ Following the issuance of an enforcement letter, dated May 16, 2013, the Permittees submitted the annual reports for Years 2008 through 2012 on June 20, 2013, ranging from five years to three months past due. As described in staff's of response to this submittal, dated July 18, 2013, the Permittees accrued no standardized fines for these violations because they submitted the reports within 35 days of staff's enforcement letter, which is a penalty-free period within which a violator may resolve a violation, as provided for by Commission Regulation 11386.

- e. Between September 11 and December 13, 2013, the Permittees determined that the area covered by the lease between the Port and Scott's does not overlap with the boundary of the pavilion;
- f. In a series of email messages between April 18 and July 24, 2014, Deputy Port Attorney Joshua Safran raised a number of issues regarding the terms of the dedication of the pavilion as a public access area. The most significant of these issues was a proposal by Mr. Safran that, due to restrictions on the Port's ability to encumber tidal lands conveyed to it by the State of California, the term of the public access dedication to be made by Scott's and the Port be limited to 66-years. Commission Staff Counsel John Bowers responded to this proposal by pointing out that that Port's proposal was based on a misconception as to the term of the dedication required by the Permit, which Mr. Safran had characterized as "permanent" or "perpetual." As Mr. Bowers advised Mr. Safran, the term of the dedication required by the Permit is not in fact "permanent," but rather, pursuant to section 10503(c) of the Commission's regulations, is limited to the duration of the permit and of the improvements that it authorizes. Mr. Bowers further advised Mr. Safran that any change in the terms of the Permit, such as a change in the term or duration of the public access dedication required by the Permit, could only occur by means of an amendment to the Permit, and that any limitation on the term of the Permit's dedication requirement would need to be accompanied by a corresponding change or reduction in the term of the Permit itself; and
- g. As of the date of this Violation Report/Complaint, the Co-Permittees have neither dedicated the 4,400-square-foot public access area in the manner required by the Permit nor submitted an application to amend the Permit to change the terms, including duration, of the Permit's dedication requirement.

J. Failure to Provide All of the Required Public Access Improvements During Public Use Days

- 1. **Nature of Violation.** Failure to install and maintain on a continuous basis since the date of issuance of the permit all of the required public access improvements when the pavilion was open.
- 2. **Legal Basis of Violation**
 - a. Special Condition II.B.5.c, Public Access, requires the Permittees to install "[a]t least four...public access signs, two permanent and two temporary, to facilitate shoreline public access between Franklin Street and Broadway on the Bay side of Scott's Restaurant. The temporary signs shall be installed and removed when approved private events are held."²⁰

²⁰ One public access sign shall be installed at the entrance to the gangway leading to the kayak launch float that describes the rules and hours for public use of the kayak launch float.

- b. Special Condition II.B.5.d, Public Access, requires the Permittees to install “[a]t least 15 tables and 35 chairs...to be in place at all times, except when the pavilion is needed for approved private events or other approved public events.”

3. Description and Evidence of Violations

- a. As evidenced by personal observations of Keith Miller, California Canoe and Kayak, and Julie Braun, Port, in emails dated April 16 and 24, 2015, respectively, Scott’s failed to install all of the required tables, chairs and signs for a 13-year period from January 1, 2000 through July 22, 2013;
- b. As evidenced by a photograph, dated July 22, 2013, taken by Mr. Fagalde and submitted by Peter Prows, Briscoe, Ivester and Bazel LLP, former counsel to Scott’s, on July 22, 2013, Scott’s partially resolved this violation by installing tables and chairs;
- c. As evidenced by Ms. Klein’s observations during a site visit on September 19, 2014 and documented with photographs, the required tables and chairs were not provided;
- d. As evidenced by two emails, dated April 16, 2014, and April 30, 2015, both from Keith Miller, Scott’s has failed to install the moveable “Public Shore” signs alongside the public tables and chairs;
- e. As evidenced by photographs taken by Robert Howard on August 13, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs;
- f. As evidenced by photographs taken by Ade Bakari on August 14, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs;
- g. As evidenced by photographs taken by Mark Madamba on August 15, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs; one sign was placed bayward and outside the perimeter of the pavilion next to the bench overlooking the Bay;
- h. As evidenced by photographs taken by Mark Madamba on August 16, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs; and
- i. As evidenced by an email, dated August 16, 2016, from Tammy Borichevsky and Keith Miller, Scott’s has failed to install both moveable “Public Shore” signs alongside the public tables and chairs.

K. Failure to Obtain Plan Approval Prior to Installation of Public Access Improvements

1. **Nature of Violation.** Failure to obtain written plan approval from the BCDC staff in advance of installing public tables and chairs.
2. **Legal Basis of Violations.** Special Condition II.A, Specific Plans and Plan Review, of the Permit states, in part, that “[n]o work whatsoever shall be commenced...until final precise ...plan information for that portion of the work have been submitted to, reviewed and approved in writing by or on behalf of the Commission. The specific drawings and information required will be determined by the staff.”
3. **Description and Evidence of Violations**
 - a. As evidenced by the photograph, dated July 22, 2013, taken by Steve Fagalde and submitted by Mr. Prows, on July 22, 2013, Scott’s installed the required public access tables and chairs prior to receiving BCDC staff review and approval of the plans required by Special Condition II.A of the Permit;
 - b. By email to Ms. Klein, dated September 19, 2013, Mr. Prows submitted a set of design specifications for the 15 public access tables and 35 chairs;
 - c. By email to Ms. Klein, dated October 15, 2013, Mr. Prows submitted a proposed public access signage plan as required by Special Condition II.B.5.c of the Permit;²¹
 - d. By email to Ms. Klein, dated October 16, 2013, Mr. Prows submitted a plan-view illustration showing the proposed locations of the public furniture for staff’s review and approval;²²
 - e. By letter to Mr. Prows, dated October 18, 2013, Ms. Miramontes retroactively approved the design specifications for the public access tables and chairs and requested changes to the signage plan;
 - f. By email to Ms. Miramontes, dated October 30, 2013, Mr. Prows submitted a revised signage plan; and²³
 - g. By letter to Mr. Prows dated November 19, 2013, Ms. Miramontes approved the signage plans, which resolved this violation.

²¹ The plans, which are not dated and do not indicate who prepared them, have the following titles: “Public Pavilion Regulatory Signs: Location/Site Plan,” “Public Pavilion Regulatory Signs: Exhibit Plan” and “Public Pavilion Regulatory Signs: Exhibit Plan, Sign Specifications.”

²² The plans, which are not dated and do not indicate who prepared them, have the following titles: “Public Pavilion Table and Chair Exhibit” and “Public Pavilion Table and Chair Exhibit, Page 2.”

²³ The plans are entitled “Public Pavilion Regulatory Sign Specifications,” dated October 22, 2013, and prepared by Steve Hanson.

VIII. ADMINISTRATIVE CIVIL PENALTY CONSIDERATIONS AND AMOUNT

Section 66641.9(a) of the McAteer-Petris Act states:

“In determining the amount of administrative civil liability, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.”

A. **Nature of the Violations.** Scott’s violated the requirements of the Permit repeatedly and consistently, as follows:

1. **Non-permit Compliant Use of the Pavilion.** Scott’s regularly held more private events than allowed by the Permit and operated the pavilion in numerous other ways that violate the requirements of the Permit.
 - a. As evidenced in five letters from the Jack London Square Partners to the Port of Oakland and BCDC and copied to Scott’s, dated April 23, 2004, March 31, 2005, March 31, 2006, February 22, 2007, and April 7, 2008, Scott’s was notified of its many and various non-permit compliant uses of the pavilion yet it continued to operate in violation of the McAteer-Petris Act and its permit;
 - b. Following the issuance on May 16, 2013, of a BCDC enforcement letter, Scott’s did not cease its non-compliant actions as evidenced by it providing 85 fewer public access days than required in 2013, and 21 fewer public access days in 2014;
 - c. In a meeting on November 18, 2014, when staff cautioned Ray Gallagher, Founder and President, Scott’s, not to hold more than 73 events that year, he asked if that meant he should cancel charity events; and
 - d. At the Design Review Board meeting on April 6, 2015, Liz Gallagher informed Ms. Klein that she had instructed her staff not to accept more than 73 events per year. Therefore, it appears that Scott’s may not have issued these instructions to its staff prior to this date.
2. **Unauthorized Use of the Franklin and Broadway Street Plazas.** Scott’s regularly displayed a promotional vehicle in the Broadway Street Plaza and stored event-related equipment including planters in the Franklin Street Plaza. Scott’s was repeatedly notified that these activities were unauthorized yet they continued to commit the violations.
3. **Event Schedules and Scheduling.** The Permittees habitually failed to submit quarterly reports and, to a lesser extent, annual summaries of scheduled events.

4. **Public Access Improvements.** Scott's failed to place the tables, chairs and signs in the pavilion when it was in public use almost continuously since 1998. As of the date of this Violation Report/Complaint, Scott's is posting only one of the two required moveable signs and it is not located in the pavilion where it is required to be located.
 5. **Permanent Guarantee of the Public Access Area.** Following issuance of the May 16, 2013, BCDC enforcement notice, the Permittees came extremely close to resolving this issue but have yet to do so despite the fact that Commission staff provided all the information necessary to achieve compliance with this requirement in a letter, from staff to permittees, dated December 12, 2013.
 6. **Failure to obtain plan approval for the public access improvements.** The Permittees failed to obtain plan approval for the public tables, chairs and signage prior to constructing the pavilion.
- B. **Circumstances of the Violations.** On multiple occasions, BCDC staff described the permit requirements, the proper corrective actions and requested that actions and events remain within the authorized numbers. Despite these meetings and communications, the same unauthorized conduct continued. Circumstances of this matter support the conclusion that violating the BCDC permit was an intentional business decision by Scott's, whereby potential BCDC penalties may have been factored into decisions to proceed unabated over at least a 12-year period.
- C. **Extent of Violations.** The non-permit compliant elements of the violations have both spatial and temporal components. The facts emphasize the long duration of these violations and the expansion of private use beyond the limits of the pavilion into the Broadway and Franklin Street Plazas.
- D. **Gravity of the Violations.** The open views of the estuary afforded by the space occupied by the pavilion, which is located between the Scott's and Kincaid's Restaurant buildings, are the only unobstructed views of the estuary that are available to persons approaching from Franklin Street. Therefore, the obstruction of those public views by Scott's unauthorized private events is a significant detriment to the public.
1. **Adverse Impacts on Public Access.** Each and every violation cited in this Violation Report/Complaint adversely impacts existing required physical and visual public access in and adjacent to the pavilion.
 2. **Unauthorized Construction of the Pavilion Enclosure System.** Scott's knowingly and intentionally commenced and completed construction of its new pavilion enclosure system without the necessary Commission staff or Commission approval. As evidenced by 13 communications between staff and the Permittees and their representatives, dated December 14, 2011, February 1, March 9, March 12, March 26, July 10, August 23, September 12, October 28, and November 20, 2012 and January 9 and 16, March 3, and March 7, 2013:

- a. One year before commencing construction, Scott's informed Commission staff that it desired to replace the authorized tent with a new pavilion enclosure system;
 - b. Staff responded by giving Scott's timely and detailed feedback on its initial and subsequent proposals, which included participating in four meetings and responding to four sets of plans plus other communications;
 - c. Scott's initial, and all subsequent, proposals included a permanent-framed entry doorway on the east side of the pavilion and a 40-foot-long wall on the north side of the pavilion, to which staff stated in its initial, and all subsequent, communications could not be approved due to their inconsistency with existing public access requirements of the permit;
 - d. Nevertheless, between November 30, 2012, and March 7, 2013, Scott's constructed a new pavilion enclosure system absent the necessary Commission staff, or Commission, approval that included the very project elements that staff had repeatedly in meetings and letters told Scott's were inconsistent with the existing permit; and
 - e. Scott's also acted in bad faith by constructing the roof connection and storage area in 2000 and 2011, respectively, without obtaining Commission staff, or Commission, approval.
3. **Permit Application Filing Process.** The Permittees failed to submit two fileable applications to retroactively authorize those elements of this project eligible for retroactive approval. As evidenced by no fewer than 38 communications between staff and permittees and their representatives, dated February 25, February 27, March 7, March 14, April 16, May 16, May 30, June 3, July 18, September 3, September 5, September 6, September 20, September 30, October 15, October 16, October 18, October 29, October 30, November 25 and December 12, 2013, and January 29, April 17, May 9, May 15, May 19, May 20, May 21, May 23, May 28, July 9, July 25, September 7, September 23, and November 18, 2014, and January 29, February 20, and April 6 (DRB meeting), 2015, the Permittees have not submitted a revised public access proposal:
- a. Following construction of the pavilion enclosure system between November 30, 2012 and March 7, 2013, Commission staff immediately and repeatedly notified the Permittees that they must submit project applications. Nevertheless, the initial application submittals were not forthcoming until September 30, 2013;
 - b. The applications requested permission for retroactive approval of the permanent metal-framed entry doorway and other elements that Commission staff had informed the Permittees it could not recommend approval of and should be removed. Further, the applications lacked a public access component and were otherwise incomplete, preventing staff from scheduling the applications for a public hearing;

- c. By letter dated October 29, 2013, Commission staff informed the Permittees of the applications' deficiencies;
- d. On February 10, 2014, as part of the application review process, the Commission's Design Review Board (DRB) considered the proposed (and as-built) project, which lacked a public access component. The Permittees stated to the DRB that the project itself resulted in a public benefit, in disregard of the permit's findings and notwithstanding the fact that the project involves installation of permanent structures in a public access area allowed to be privately used only 20% of each year;
- e. During a meeting on April 17, 2014, Commission staff and Mr. Fagalde together reviewed the outstanding application filing requirements and the DRB's comments on the proposal to assist the Permittees in successfully filing both of their applications;
- f. Having not heard from the Permittees, Ms. Klein contacted Mr. Fagalde on May 9, 2014, to find out when they would submit revised applications;
- g. On May 15, 2014, Mr. Fagalde asked if it was true that the applications were incomplete;
- h. By letter dated May 16, 2014, Mr. Fagalde declined to follow the Design Review Board's recommendation from February 10, 2014, to remove the permanent metal-framed entry doorway from the project design. It remained part of the applications;
- i. By letter dated July 9, 2014, nearly nine months following issuance of the application-filing letter, dated October 29, 2013, the Permittees submitted two revised applications, which still included the metal-framed entry doorway and lacked a public access proposal;
- j. On September 23, 2014, during a face-to-face meeting with the Permittees, staff again informed the Permittees that it would recommend denial of the applications due to the presence of the metal-framed entry doorway and the absence of a public access proposal;
- k. On February 20, 2015, five months following the meeting on September 23, 2014, and two years following the unauthorized construction of the new pavilion, the Permittees heeded staff's longstanding advice and finally submitted plans that omitted the permanent metal-framed entry doorway and included a public access proposal;
- l. As such, between May 16, 2013 and February 20, 2015, the Permittees declined to invest in alternate designs for a pavilion entry that would not permanently occupy the east side of the pavilion;
- m. As such, between September 30, 2013 and February 20, 2015, the applications lacked a public access proposal to offset the adverse impacts of the proposed (and as-built) pavilion enclosure system;

- n. On April 6, 2015, Scott's presented its revised project that omitted the permanent metal-framed entry doorway and included a public access proposal to the Design Review Board. The Board made recommendations to Scott's for design modifications to its proposal; and
- o. As of the date of this Violation Report/Complaint, the Permittees have yet to submit a revised public access proposal following the DRB meeting on April 6, 2015, or to file their applications as complete.

4. Failure to Cooperate

- a. On May 30, 2013, during a site visit with the Commission's Executive Director, Mr. Fagalde stated he would not remove the permanent metal-framed entry doorway;
- b. During a meeting with Ms. Miramontes and Ms. Klein on April 17, 2014, Mr. Fagalde said he could not remove the permanent metal-framed entry doorway;
- c. During a meeting with Commission staff on November 18, 2014, Mr. Gallagher said he could not remove the permanent metal-framed entry doorway;
- d. As these communications show, it was not a matter of not being able to remove the permanent metal-framed entry doorway from the project for a 3.5-year period, but rather an unwillingness to remove it. This became apparent when, on February 20, 2015, the Permittees submitted a plan proposing to replace the permanent metal-framed entry doorway with additional retractable wall panels that include an entry doorway;
- e. In September 2015, after the Executive Director informed the Permittees that he intended to initiate an enforcement proceeding regarding the numerous violations that would likely result in the Commission issuing a cease and desist and civil penalty Violation Report/Complaint, the Permittees requested an opportunity to seek to negotiate a proposed settlement with BCDC. On July 19, 2016, the Permittees and BCDC staff agreed in principle on a settlement framework, subject to review and approval of a proposed stipulated Violation Report/Complaint by the Enforcement Committee and by the Commission; and
- f. On November 3, 2016, the Commission rejected the Enforcement Committee recommended enforcement decision to adopt the proposed stipulated Violation Report/Complaint negotiated by the Permittees and BCDC staff. Following the Commission action, the Executive Director informed the Permittees that BCDC staff was willing to discuss resolving the violations via an alternative or revised proposed agreement, but only after staff received a written proposal from the Permittees that adequately responded to the Commission's clear direction.
- g. As of December 9, 2016, the staff determined that the Permittee's proposal, received on December 8, 2016, failed to adequately respond to the Commission's direction.

E. **Susceptible to Removal or Resolution.** Whether the violation is susceptible to removal or resolution:

1. **Susceptible**

- a. The unpermitted construction of the new pavilion enclosure system is likely susceptible to resolution through the combined removal of portions of the new pavilion enclosure system and after-the-fact approval of the remainder of it; and
- b. The failure to gain approval of a legal instrument to permanently guarantee the public access area and/or record an approved legal instrument is also susceptible to resolution by obtaining staff approval of a legal instrument and subsequently recording it.

Maintenance of public access areas free from storage of restaurant related equipment.

Provision of all required public access improvements (public access tables, chairs and signs).

Permit compliant use of the pavilion 292 days/year, etc.

2. **Not Susceptible.** The following actions are not susceptible to removal or resolution:

- a. The multitude of past permit non-compliant uses, such as but not limited to the provision of fewer than 292 public access days at the pavilion, from 2004 through 2014 and continuing through the present;
- b. The past installation, storage and display of unauthorized structures and materials in the Broadway and Franklin Street Plazas;
- c. The past failure to submit quarterly reports of proposed events in a timely manner;
- d. The past failure to submit annual reports in a timely manner; and
- e. The failure to provide all of the required public access tables, chairs and signs between 2000 and the present.

F. **Cost to State.** The estimated cost to the state in pursuing this enforcement action currently totals at least 1,109 hours and a cost of over \$83,224 and accruing:

- a. BCDC's Executive Director has participated in one onsite meeting following construction of the unauthorized pavilion enclosure system, provided direction to staff on how to manage this enforcement case, and participated in settlement negotiations totaling at least 100 hours to date;
- b. BCDC's Regulatory Director has participated in four onsite meetings, taken photographs of Scott's during multiple visits to Jack London Square, and provided direction to staff on how to manage this enforcement case, and participated in settlement negotiations totaling at least 140 hours to date;

- c. BCDC's Bay Design Analyst, acting as lead design analyst, has participated in eight onsite meetings before and after construction of the unauthorized pavilion enclosure system, participated in at least four office meetings assisting with the design of a public access proposal, written at least four letters providing detailed design direction, provided direction on application filing requirements, officiated the preparation for and execution of two Design Review Board proceedings, written countless emails, and received and placed numerous telephone calls, totaling at least 190 hours to date;
- d. BCDC's Chief of Enforcement, acting as lead enforcement and permit analyst, has participated in four onsite meetings after construction of the unauthorized pavilion enclosure system, at least four office meetings assisting with the explanation of the violations and how to resolve them and permit application filing requirements, written at least four letters outlining the nature of the violations, and the enforcement options to resolve them including administrative civil penalties, participated in the preparation for and execution of two Design Review Board meetings, reviewed the permit and enforcement files, written countless emails, and received and placed numerous telephone calls, totaling at least 350 hours to date.
- e. BCDC's Staff Counsel and Chief Counsel have participated in at least six meetings with the Permittees, responded to draft legal instruments submitted to resolve one of the permit violations, assisted with the preparation of the this Violation Report/Complaint, and provided direction to staff on how to manage this enforcement case, totaling at least 225 hours.
- f. BCDC's support staff has prepared all the correspondence between staff and the Permittees, conducted the associated filing of documents and various other support activities, totaling at least 104 hours.

G. With Respect to the Violator

- 1. **Ability to Pay.** While staff does not know the profit margin for each of the events, Scott's holds in the Pavilion, staff believes Scott's has the ability to, and should, pay a substantial penalty because the company has financially gained from conducting unauthorized private business in a public space that has been denied to the public for a total of 374 days between 2004 and the present (using the single criterion of days fewer than 292 per year that the pavilion was not publicly available).
- 2. **Effect on Business.** Scott's has provided no evidence to staff that resolution of these violations will impede Scott's ability to continue in business. Scott's business plan should not depend on revenue from unauthorized events. Long before it gained BCDC permission in 1998 to construct the pavilion, Scott's operated its business in an 18,000-square-foot building that included a dining room, six banquet rooms, and an outdoor dining area on the west side of the building (the pavilion is located on the east side of the building). At the time of issuance of the authorization to construct the pavilion in a public access area in 1996, Scott's signed the permit with an understanding that the terms of use of the pavilion were limited to 73 days per

year and that it must be publicly available 292 days per year among other limitations. Scott's should not be allowed cost-recovery for the construction of unauthorized structures that in part support an illegal use. Should Scott's be required to remove any of the as-built and unauthorized structures, such as the permanent metal entry doorway, which could be replaced with retractable wall panels, the removal and reconstruction costs should not be considered as an impact on the ability to continue in business or to offset and administrative civil penalties. Scott's initiated this project to enhance its business and must bear 100% of the costs of having undertaken this project illegally, which may include reconstruction costs and an administrative civil penalty.

3. **Voluntary Removal or Resolution.** Staff finds no evidence that Scott's has made any effective effort to voluntarily remove the unauthorized structures. Instead the record demonstrates a steady pursuit of project completion and retention in direct contradiction to the information and direction provided by the BCDC staff, as outlined below:
 - a. On December 19, 2012, Scott's installed a tent, walkway and stanchions in the Port's public access area. In response to being advised by Maryann Starn, Cushman and Wakefield, to remove these structures, Mr. Fagalde declined to take responsibility for his actions by directing Ms. Starn to speak directly with the client to whom he had rented the pavilion, which Ms. Starn declined to do as her contract is with Scott's and not its patrons. Following a refusal to remove the structures, Mr. Fagalde stated "[a]re we done?" (Email exchange between Ms. Starn to Mr. Fagalde, dated December 19, 2012);
 - b. On December 14, 2011, a full year prior to construction of the new pavilion enclosure system on December 28, 2013, Scott's voluntarily contacted and met with three members of the BCDC staff (Brad McCrea, Ellen Miramontes and Adrienne Klein) about its desire to replace the authorized canvas fabric panels with a combination of permanent and moveable wall panels and submitted design drawings. The initial design essentially depicted four permanent corner walls. In response, staff informed Scott's that the proposal could not be approved because it would block Bay views, obstruct physical public access and prevent free-flowing pedestrian movement through the Franklin Street Plaza;
 - c. During the ensuing 12-month-period, staff met with Scott's three more times (on February 1, March 9, and July 10, 2012) and issued four letters to Scott's (dated March 26, August 23, September 12, and November 20, 2012) following receipt of each of Scott's submittals (dated March 12, August 23, and October 28, 2012);
 - d. To a certain extent, Scott's proposal evolved positively with a system that tucked away well when not in use, compared with the original proposal, which would have permanently occupied the pavilion on all four sides when in public use mode;

- e. However, in disregard of staff's direction, each of Scott's proposals continued to include a permanent metal-framed entry doorway on the east side of the pavilion;
- f. The record shows that Scott's was determined to retain the permanent metal-framed entry doorway rather than invest resources in finding a solution that would preserve the open-air nature of the pavilion for the 80% of the time that the pavilion is required to be public, as follows:
 - (1) Mr. Fagalde stated "the pavilion is unused by the public" and expressed interest in eliminating the public access requirement and providing alternate public access elsewhere (Statement by Mr. Fagalde during an onsite meeting on July 10, 2013);
 - (2) Scott's "tried with all the technology and design work available to address the...impediments to the public access and preserve public views" (Steve Hanson, Scott's architect and representative, in a letter dated August 23, 2012);
 - (3) "[i]t is necessary to preserve the point of entry" (Mr. Hanson stated in a letter dated August 23, 2012);
 - (4) There are imperative time constraints and it would be "ideal if we could make these improvements before the winter banquet season" (Mr. Hanson in a letter dated August 23, 2012);
 - (5) "We don't believe there is an alternative to some sort of entry way that fronts Franklin Street and is visible to the public during functions. We also believe that our current design provides an unobtrusive and transparent structure during non-scheduled events at the pavilion" (Mr. Hanson in a letter dated August 23, 2012); and
 - (6) By letter dated October 28, 2012, Mr. Hanson submitted the last set of plans prior to commencement of unauthorized construction of the new enclosure system, to which Ms. Miramontes responded by letter, dated November 20, 2012. As the project design had improved, she was supportive of the design, with the exception of the continued depiction of the permanent metal-framed entry doorway. She did not approve the project.
- g. In conclusion, not only did Scott's ignore BCDC staff's design direction, it built the very project that staff denied, while claiming it believed the construction was approved, as described below;
- h. Notwithstanding the afore-described year-long exchange, the new pavilion enclosure system was constructed between December 28, 2012, and March 7, 2013, absent BCDC plan approval or any form of communication from Scott's or its representative that it intended to undertake construction or had commenced construction.

- (1) During this approximately 70-day period, Scott's built the new enclosure system in several stages.
 - (2) During the first phase of construction, Keith Miller, California Canoe and Kayak, notified BCDC staff of the ongoing and unauthorized construction. As a result of his call, on January 9, 2013, Ms. Miramontes notified Scott's that the construction it was undertaking was unauthorized because it lacked the necessary staff approval and that Scott's must immediately provide plans and an amendment request;
 - (3) Rather than heed staff's direction, Scott's continued construction and failed for three months, until April 16, 2013, to submit revised plans or an amendment request;
 - (4) On February 25, 2013, Mr. Miller again contacted BCDC staff and stated that Scott's had now constructed a tent adjacent to the still-closed pavilion (in the Franklin Street Plaza), behind which Scott's was constructing a permanent metal-framed entry doorway. On February 25, 2013, Ms. Miramontes again notified Scott's that its continued construction was unauthorized because it lacked the necessary staff approval, and she asked when Scott's would be providing the necessary plans and amendment request; and
 - (5) On or about April 11, 2013, as evidenced by photographs taken and submitted by Mr. Miller, Scott's constructed and installed approximately 12 rectangular planters around the pavilion, stating that they were necessary to protect the pavilion. Scott's and its representatives had never discussed the planters with Ms. Miramontes or any member of the BCDC staff nor had it shown them on the many sets of plans it had provided to staff before or after the unauthorized pavilion construction project.
- i. Mr. Hanson, Scott's architect and representative, provided the following explanations for Scott's behavior during this period:
- (1) He admitted that Scott's was proceeding with construction absent the necessary BCDC review and approval and stated that the project was an evolving design-build project that necessitated the construction and installation of several mock-ups and trial and error systems (Letter to Ms. Miramontes dated January 16, 2013);
 - (2) He stated, "...we simply made several trial and error efforts until we found something that met the requirements. So in essence...it has been a design build project which is why you will not see the typical plans and specifications that you might see for a public works project" (Email to Ms. Miramontes dated January 16, 2013); and
 - (3) He stated that Scott's believed it had obtained the necessary plan approval to proceed with construction of the retractable wall panel system (Letter dated February 27, 2013).

- j. In conclusion, it is not possible that Scott's or its representatives could have believed that the proposal was approved and eligible for construction. As for the storage area, roof extension and planters, Scott's simply constructed and installed these business related private assets, largely in public access areas, without ever consulting BCDC;
- k. More than 3.5 years since the staff notified Scott's that it must either remove the unauthorized pavilion enclosure system or submit two permit applications to retroactively approve the pavilion enclosure system, the Permittees have yet to file their permit application/s as complete:
 - (1) The Permittees persisted in retaining the metal-framed entry doorway as part of their applications from April 16, 2013 until January 29, 2015, despite having been informed by two letters, each dated May 16, 2013, that the doorway proposal would render the project ineligible for a staff recommendation of approval to the Commission;
 - (2) The applications lacked a public access proposal until February 20, 2015, despite having been informed by letter, dated May 16, 2013, that the absence of one would render the project ineligible for a staff recommendation of approval to the Commission;
 - (3) As of the date of issuance of this report and following the Design Review Board's review, on April 6, 2015, of the public access proposal, the Permittees have not submitted a revised public access proposal responsive to the Board's comments; and
 - (4) The Permittees have also not yet submitted two documents from the City of Oakland, a CEQA determination and a discretionary approval or evidence that none is required, both of which were cited as necessary application filing requirements in a letter to the Permittees from staff, dated May 16, 2013.
- l. Since the commencement of BCDC's enforcement investigation in January, 2013, after staff notified Scott's of its permit non-compliant use of the pavilion, Scott's continued to provide fewer than 292 public access days in the pavilion, among the other permit non-compliant uses outlined in this Violation Report/Complaint, install unauthorized structures in the Franklin and Broadway Street Plazas, and failed to provide the public access tables, chairs and signs in the pavilion when it is in public use. The record clearly shows that Scott's has failed to voluntarily comply with the use requirements of the pavilion even when engaged in an active enforcement action by the BCDC; and
- m. On February 5, 2016, Adrienne Klein, in person asked Alain Placio, City of Oakland Civil Engineer, Building Services Division, and Ed LaByog, City of Oakland Senior Specialty/Combination Inspector, Inspections and Code Enforcement Services, whether there are any local code requirements that necessitate the permanent metal entry doorway or whether another type of pavilion entry could meet the City's requirements for compliant egress, such as during an emergency.

Both the building official and the planner stated that there other ways to construct a pavilion entry doorway to meet the City's requirements for compliant egress. The City staff showed Ms. Klein a copy of the plans that Scott's had presented to BCDC's Design Review Board on April 6, 2015, that do not include the metal entry doorway, and stated that the City Planning Department would soon issue a discretionary approval for this proposal. This meeting proves as false Scott's argument that the metal entry doorway was necessary and also that Scott's misrepresented the City's position on the matter. This constitutes submitting an application based on false information and would constitute grounds for pursuing a permit revocation if a permit for the retention of the metal entry doorway had been issued based on this information.

- n. On December 8, 2016, Scott's submitted its local discretionary approval from the City of Oakland, issued on December 5, 2016, for the "...moveable sliding panel walls to enclose the Public Pavilion at JLS for Special Events pursuant to BCDC Permit Nos. 1985.019A and 1985.019B."
4. **Prior History.** The Permittees have been serially violating the McAteer-Petris Act and the Permit since at least 2000 as shown by the nature and extent of the failure to operate the pavilion in compliance with the permit.
5. **Culpability.** Scott's is fully responsible and thus culpable. Scott's executed the Permit, attesting that it understood the permit conditions, and has proceeded for 15 years to ignore the requirements of its permit and the McAteer-Petris Act and the direction from many members of the BCDC staff.
6. **Economic Savings.** Staff is not in a position to quantify the economic savings to the Permittees resulting from the violations, but Scott's has clearly benefitted economically from deferring removal of the unauthorized construction at the pavilion while continuing to over use the pavilion for private events. Similarly, Scott's has not disputed that it profited from the events in excess of 73 per year that it holds in the pavilion. While staff has not subpoenaed Scott's business records, during a meeting at the pavilion on March 9, 2012, at which Ray Gallagher, President, was present, Steve Fagalde informed Ms. Miramontes that the "current tent earnings" (i.e., the pavilion) garner \$800,000 per year and could increase to \$2.5 million. On December 8, 2016, Michael P. Verna, Bowles and Verna LLP, counsel to Scott's, submitted a letter to Marc Zeppetello, attached to which is a chart entitled "Public Pavilion at Scott's Restaurant," which claims that Scott's net profit from overuse of the Pavilion for the 11-year period from 2006 through November, 2016 totaled only \$4,150. Scott's provided no support for the figures in the chart accompanying Mr. Verna's letter, but staff notes that pavilion overuse was improperly based only on use of the pavilion for for-profit events and excluded use of the pavilion for events Scott's claims to have been for charitable events. Staff does not find that net profit or "overage profit" amounts shown on the chart to be credible.

7. **Such other matters as justice may require.** No other business located within BCDC's jurisdiction has made such extensive use of a dedicated public access for private profit. No other business within BCDC's jurisdiction has so flagrantly, extensively and knowingly violated the terms of its permit and the McAteer-Petris Act.

The McAteer-Petris Act and Section VIII.B.2 identifies the proposed total penalty with a breakdown of the penalty amount each for the seven violation categories described in Section VII.D and pursuant to the findings described in Section VIII.A.2.

- H. **Daily Penalty Amount and Administrative Maximum.** Section 66641.5(e) of the McAteer-Petris Act states that civil liability may be administratively imposed by the Commission on any person or entity for any violation of the law or any term or condition of a permit issued by the Commission in an amount which shall be not less than ten dollars (\$10), nor more than two thousand (\$2,000) for each day in which that violation occurs or persists, but the Commission may not administratively impose a fine of more than thirty thousand \$30,000 for a single violation. The following section identifies the total proposed penalty with a breakdown of the penalty for each of the seven categories of violations described in Section VII.E through VII.K and pursuant to the proposed findings described in Sections VIII.A. through VIII.G.

1. **Selection of Daily Penalty.** Staff finds that constructing a new pavilion enclosure system without BCDC authorization and providing fewer than 292 public use days per year at the pavilion are the most serious violations undertaken by the permittees. While staff could easily recommend the maximum fine of \$2,000 per day for these violations, it has elected to recommend half the maximum fine of \$1,000. At the low end of the fine range, staff recommends \$100 per day for the untimely submittal of quarterly and annual reports regarding the pavilion use because this type of violation is relatively simple to remedy and for the other permit noncompliant uses at the pavilion in recognition of the complex structure of the use limitations established by the permit.

The daily fine amount for the remaining violations ranges from \$250 to \$500 per day. Failure to install public furniture and signage is assessed a daily fine of \$500, whereas failure to permanently dedicate the public access area is assessed \$250 because the absence of furniture and signage in the pavilion diminishes its value as a public amenity, whereas the function of a recorded covenant on title is to provide prior notice of public access requirements to future owners of the project site. The unauthorized use of the Franklin and Broadway Street plazas is assessed a fine of \$250 per day.

Due to their longstanding duration, the maximum administrative fine of \$30,000 is reached for the following violations: a) the unauthorized pavilion construction, b) the failure to install the required public amenities, c) the failure to dedicate the public access area, d) the late submittal of 6 of 8 required annual summaries of events and the late submittal of 7 of 9 quarterly reports and e) the late submittal of plans for the public access amenities. Each of these violations lasts for a period of

time that renders the potential fine per violation greater than \$30,000. However, day after day each of these violations remains the same violation and, therefore, the assessable fine is capped at \$30,000.

However, each time the Permittees undertake one of the six types of non-compliant use of the pavilion and each time they make an unauthorized private use of the Franklin and Broadway Street plazas, it is a separate, new violation. While still subject to between \$10 per day and \$2,000 per day, the administrative maximum of \$30,000 is never reached for any single violation. As such, fines ranging from \$100 to \$250 per violation for 1,045.8 [= (183 + 107.4 + 20 + 2.4 + 339) + 394] separate violations result in a significant penalty due to the extensive number of violations.

2. **Proposed Penalty.** Staff is proposing that the Commission impose an administratively civil penalty of **\$841,360** for the violations outlined in Section VII.E through VII.K, as described below and summarized in the two-page chart of penalties attached as Exhibit B.
 - a. **Construction of Unpermitted Development.** Staff proposes that the Commission impose the maximum administrative penalty of \$30,000 for each of the following four violations, totaling **\$120,000**:
 - (1) Unpermitted construction of the metal-framed entry doorway from March 4, 2013, through the present. At a daily rate of \$2,000, the administrative maximum was reached on March 19, 2013;
 - (2) Unpermitted construction of the retractable wall panel system from January 1, 2013, through the present. At a daily rate of \$2,000, the administrative maximum was reached on January 16, 2013;
 - (3) Unpermitted construction of the storage area and stage from at least July 31, 2011, through the present. At a daily rate of \$2,000, the administrative maximum was reached at least by August 15, 2011; and
 - (4) Unpermitted construction of the roof extension from at least March 31, 2000 through the present. At a daily rate of \$2,000, the administrative maximum was reached at least by April 15, 2000.
 - b. **Non-permit Compliant Use of the Pavilion.** Staff proposes that the Commission impose an administrative penalty of **\$439,360** for the following violations:

Each use of the pavilion that is in violation of the permit's requirements is a single violation subject to a potential fine of between \$10 and \$2,000 per day. The maximum daily fine for each of these violations is \$2,000 and the administrative maximum of \$30,000 is never reached because each violation lasts for one day. As has been outlined in detail in Section VII.F above, there are annually multiple days of knowing and intentional misuse between 2004 and 2015, resulting in the substantial penalty recommended by staff.

- (1) **Minimum Number of Public Use Days (annual).** As outlined below, the 374 permit non-compliant use days are subject to a potential fine of between \$3,740 (at a rate of \$10/day) and \$748,000 (at a rate of \$2,000/day). Staff proposes that the Commission impose a penalty of \$1,000/day totaling **\$374,000**.

In **2004**, the Permittees put the pavilion to a non-permit compliant use 97 times, which is 24 fewer public access days than allowed.

In **2005**, the Permittees put the pavilion to a non-permit compliant use 110 times, which is 37 fewer public access days than allowed.

In **2006**, the Permittees put the pavilion to a non-permit compliant use 99 times, which is 26 fewer public access days than allowed.

In **2007**, the Permittees put the pavilion to a non-permit compliant use 87 times, which is 14 fewer public access days than allowed.

In **2008**, the Permittees put the pavilion to a non-permit compliant use 92 times, which is 19 fewer public access days than allowed.

In **2010**, the Permittees put the pavilion to a non-permit compliant use 88 times, which is 15 fewer public access days than allowed.

In **2011**, the Permittees put the pavilion to a non-permit compliant use 85 times, which is 12 fewer public access days than allowed.

In **2012**, the Permittees put the pavilion to a non-permit compliant use 194 times, which is 121 fewer public access days than allowed.

In **2013**, the Permittees put the pavilion to a non-permit compliant use 158 times, which is 85 fewer public access days than allowed.

In **2014**, the Permittees put the pavilion to a non-permit compliant use 94 times, which is 21 fewer public access days than allowed.

- (2) **Minimum Number of Public Use Weekend Days and Nights (winter season average).** As outlined below, the 2.4 days of permit non-compliant use are subject to a potential fine of between \$24 (at a rate of \$10/day) and \$4,800 (at a rate of \$2,000/day). Staff proposes that the Commission impose a penalty of \$100/day totaling **\$240**.

In **2013**, the Permittees provided an average of four tenths of a day (0.4) fewer weekend days and nights than required during the six-month winter season, for a total of 2.4 violation days.

- (3) **Maximum Number of Private Use Weekend Days and Nights (winter season average).** As outlined below, the 107.4 days of permit non-compliant use are subject to a potential fine of between \$1,074 (at a rate of \$10/day) and \$214,800 (at a rate of \$2,000/day). Staff proposes that the Commission impose a penalty of \$100/day totaling **\$10,740**.

In **2004**, the Permittees used the pavilion an average of one (1) more day/month than allowed during the six-month winter season, for a total of 6 violation days.

In **2005**, the Permittees used the pavilion an average of two and a half (2.5) more days/month than allowed during the six-month winter season, for a total of 15 violation days.

In **2006**, the Permittees used the pavilion an average of two and a half (2.5) more days/month than allowed during the six-month winter season, for a total of 15 violation days.

In **2007**, the Permittees used the pavilion an average of half (0.5) a day/month more than allowed during the six-month winter season, for a total of 3 violation days.

In **2008**, the Permittees used the pavilion an average of eight tenths (0.8) of a day/month more than allowed during the six-month winter season, for a total of 4.8 violation days.

In **2012**, the Permittees used the pavilion an average of five (5) more days/month than allowed during the six-month winter season, for a total of 30 violation days.

In **2013**, the Permittees used the pavilion an average of four and six tenths (4.6) more days/month than allowed during the six-month winter season, for a total of 27.6 violation days.

In **2014**, the Permittees used the pavilion an average of one (1) more day/month than allowed during the six-month winter season, for a total of 6 violation days.

- (4) Maximum Number of Private Use Weekend Days and Nights (summer season average).** As outlined below, the 183 days of permit non-compliant use are subject to a potential fine of between \$1,830 (at a rate of \$10/day) and \$366,000 (at a rate of \$2,000/day). Staff proposes that the Commission impose a penalty of \$100/day totaling **\$18,300**.

In **2004**, the Permittees used the pavilion an average of four (4) more days/month than allowed during the six-month summer season, for a total of 24 violation days.

In **2005**, the Permittees used the pavilion an average of four and six tenths (4.6) more days/month than allowed during the six-month summer season, for a total of 27.6 violation days.

In **2006**, the Permittees used the pavilion an average of three and a half (3.5) more days/month than allowed during the six-month summer season, for a total of 21 violation days.

In **2007**, the Permittees used the pavilion an average of one and a half (1.5) days/month more than allowed during the six-month summer season, for a total of 9 violation days.

In **2008**, the Permittees used the pavilion an average of two and eight tenths (2.8) of a day/month more than allowed during the six-month summer season, for a total of 16.8 violation days.

In **2009**, the Permittees used the pavilion an average of eight tenths (0.8) of a day/month more than allowed during the six-month summer season, for a total of 4.8 violation days.

In **2010**, the Permittees used the pavilion an average of one (1) more day/month than allowed during the six-month summer season, for a total of 6 violation days.

In **2011**, the Permittees used the pavilion an average of two and one tenth (2.1) more days/month than allowed during the six-month summer season, for a total of 12.6 violation days.

In **2012**, the Permittees used the pavilion an average of five and a half (5.5) more days/month than allowed during the six-month summer season, for a total of 33 violation days.

In **2013**, the Permittees used the pavilion an average of three and one tenth (3.1) more days/month than allowed during the six-month summer season, for a total of 18.6 violation days.

In **2014**, the Permittees used the pavilion an average of one and a half (1.5) days/month more than allowed during the six-month summer season, for a total of 9 violation days.

In **2015**, the Permittees used the pavilion an average of six tenths (0.6) days/month more than allowed during the six-month summer season, for a total of 4 violation days.

- (5) **Minimum Number of Public Use Weekend Days and Nights (per month).** As outlined below, the 20 days of permit non-compliant use are subject to a potential fine of between \$200 (at a rate of \$10/day) and \$40,000 (at a rate of \$2,000/day). Staff proposes that the Commission impose a penalty of \$100/day totaling **\$2,000**.

In **2004**, in May there was one (1) less than the minimum number of public use weekend days and nights.

In **2012**, in March there were two (2) less, in May there were three (3) less, in September, there was one (1) less, and in December there were three (3) less, than the minimum number of public use weekend days and nights, totaling nine (9) unavailable days.

- (6) **Maximum Number of Consecutive Private Use Days.** As outlined below, the 339 days of permit non-compliant use are subject to a potential fine of between \$3,390 (at a rate of \$10/day) and \$678,000 (at a rate of \$2,000/day). Staff proposes that the Commission impose a penalty of \$100/day totaling **\$33,900**.

In **2004**, Scott's held a total of 12 more than 2 consecutive events.

In **2005**, Scott's held a total of 38 more than 2 consecutive events.

In **2006**, Scott's held a total of 16 more than 2 consecutive events.

In **2007**, Scott's held a total of 9 more than 2 consecutive events.

In **2008**, Scott's held a total of 11 more than 2 consecutive events.

In **2009**, Scott's held a total of 3 more than 2 consecutive events.

In **2010**, Scott's held a total of 10 more than 2 consecutive events.

In **2011**, Scott's held a total of 9 more than 2 consecutive events.

In **2012**, Scott's held a total of 111 more than 2 consecutive events.

In **2013**, Scott's held a total of 93 more than 2 consecutive events.

In **2014**, Scott's held a total of 18 more than 2 consecutive events.

In **2015**, Scott's held a total of 9 more than 2 consecutive events.

- c. **Unpermitted Use of the Franklin and Broadway Street Plazas.** The 394 days the Permittees placed a tent or stanchions, stored event related equipment or staged a promotional vehicle in either plaza up to July 1, 2015, are subject to a potential fine of between \$3,940 (at a rate of \$10/day) and \$788,000 (at a rate of \$2,000/day). Staff proposes that the Commission impose a penalty of \$250/day totaling **\$98,500**.

d. **Untimely Submittal of Private Event Schedules**

- (1) **Quarterly Penalty Range.** The 766 days late Scott's submitted, or failed to submit, nine quarterly reports are subject to a potential fine of between \$7,660 (at a rate of \$10/day) and \$242,000 (at a rate of \$2,000/day factoring the administrative limit per violation).
- (2) **Annual Penalty Range.** The 379 days late the Port submitted eight annual reports are subject to a potential fine of between \$3,790 (at a rate of \$10/day) and \$232,000 (at a rate of \$2,000/day factoring the administrative limit per violation).
- (3) **Total Proposed Penalty.** Staff proposes that the Commission impose a \$100/day penalty for each late report subtotaling \$37,900 and for the late annual reports and subtotaling \$76,600 for the late quarterly reports, together totaling **\$114,500**.

In **2003**, the Permittees submitted the annual summary of events 54 days late.

In **2004**, the Permittees submitted the annual summary of events 30 days late.

In **2005**, the Permittees submitted the annual summary of events 30 days late.

In **2006**, the Permittees submitted the annual summary of events 53 days late.

In **2007**, the Permittees submitted the annual summary of events 37 days late.

In **2013**, the Permittees submitted the annual summary of events 11 days late and Scott's submitted its quarterly reports a cumulative total of 97 days late.

In **2014**, the Permittees submitted the annual summary of events 15 days late and Scott's submitted its quarterly reports a cumulative total of 104 days late.

In **2015**, the Permittees submitted the annual summary of events 149 days late and Scott's submitted its quarterly reports a cumulative total of 357 days late, as of July 1, 2016. The large number represents the absence of a fourth quarter report.

In 2016, Scott's submitted its quarterly reports a cumulative total of 208 days late, as of July 1, 2016. The large number represents the absence of a first quarter report.

- e. **Failure to Permanently Dedicate the Pavilion Public Access Area.** The 5,475 days that have passed between pavilion construction and the July 1, 2015 (= 365 x 15 years) are subject to a potential fine of between \$54,750 (at a rate of \$10/day) and \$10,950,000 (at a rate of \$2,000/day). Staff proposes that the Commission impose a penalty of \$250/day, totaling \$1,368,750. However, as this amount exceeds the administrative limit, staff proposes the maximum of **\$30,000**.
- f. **Failure to Provide All Required Public Access Improvements During Public Use Days.** The 4,745 days that have passed between pavilion construction and July 1, 2015 (= 365 x 13 years through July 1, 2015) are subject to a potential fine of between \$47,450 (at a rate of \$10/day) and \$9,490,000 (at a rate of \$2,000/day). Staff proposes that the Commission impose a penalty of \$500/day, totaling \$2,372,500. However, as this amount exceeds the administrative limit, staff proposes the maximum of **\$30,000**.

- g. **Failure to Obtain Plan Approval Prior to Installation of Public Access Improvements.** The 90 days between the time the Permittees installed the tables and chairs and obtained plan approval are subject to a potential fine of between \$900 (at a rate of \$10/day) and \$180,000 (at a rate of \$2,000/day). Staff proposes that the Commission impose a penalty of \$100/day, totaling **\$9,000**.

IX. Any Other Statement or Information that the Staff Believes is Either Pertinent to the Alleged Violation or Important to a Full Understanding of the Alleged Violations

As of the date of issuance of this report, all but one (plan approval) of the alleged violations are ongoing and the respondents have neither removed the unauthorized structures, filed as complete the permit amendment applications to legalize the unpermitted construction nor ceased the permit non-compliant and illegal uses of the pavilion and the unpermitted uses of the Franklin Street Plaza.

X. List of Staff Exhibits

Exhibit A: Index of Administrative Record

Exhibit B: Summary of Violations and Proposed Administrative Civil Penalties